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In the Supreme Court of the United States

OCTOBER TERM [redacted] 1969

No. [redacted] 252

JULIO DEJORIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review its decision and opinion affirming a judgment against the Petitioner on his suit for a refund of taxes and in favor of the Respondent on its counterclaim for $18,851.40 entered after the verdict of a jury on November 20, 1967.

OPINIONS BELOW

The decision and opinion of the Fifth Circuit is found in Appendix A hereof and is reported in F.2d

JURISDICTION

The judgment of the Court of Appeals was entered on March 21, 1969, Appendix B. The jurisdiction of the Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

I.

IS THERE A CONFLICT AMONG THE CASES IN THE SEVERAL CIRCUITS AS TO WHETHER THE COURT BELOW SHOULD HAVE NOTICED IN THIS TAX CASE, EVEN IN THE ABSENCE OF OBJECTION AT THE TRIAL LEVEL, A FUNDAMENTAL AND SERIOUS ERROR IN THE CHARGE TO THE JURY.

II.

WAS THE CHARGE AS GIVEN TO THE JURY ADEQUATE, IN LAW, TO PERMIT IT TO REACH AN INFORMED DECISION IN THIS CASE.

STATEMENT OF THE CASE

The Petitioner, plaintiff, filed his complaint against the United States of America, defendant, claiming a refund of cabaret excise taxes for the period beginning January 1, 1960, and ending September 30, 1962, in the amount of $1,050.00 alleging that the Commissioner of Internal Revenue had erroneously determined that he was liable for additional cabaret taxes for the above period. The defendant then counterclaimed for the unpaid balance of the assessments in the amount of $26,161.25.

The determination of the Commissioner of Internal Revenue had found that the additional cabaret taxes were due (1) because of understated sales; and (2) because all sales during the entertainment period were not reported for cabaret tax purposes.

The case was tried before a jury on November 20, 1967, and special interrogatories were submitted to the jury as to (1) whether the correct total amount of sales made by the plaintiff were as reported by him; as determined by the Commissioner of Internal Revenue; or as to be determined by the jury; and (2) whether approximately 50% of the plaintiff's sales as reported by him were subject to the cabaret tax; whether approximately 90% as determined by the Commissioner of Internal Revenue were subject to the tax; or the percentage to be determined by the jury.

As to the first interrogatory, the jury determined that the total sales were as determined by the Commissioner of Internal Revenue and, as to the second issue, they determined the correct percentage to be 75%. The jury finding regarding the second issue was not appealed.

Plaintiff moved for a directed verdict, which was denied, and also filed a Motion for Judgment N.O.V. or, in the alternative, for a New Trial in connection with the first issue as to the total sales, which motion was also denied. Judgment was then entered against the plaintiff on his suit for refund and in favor of the defendant on its counterclaim in the amount of $18,851.40.

The plaintiff, Julio DeJoris, operated a nightclub in Miami Beach, Florida, during the periods involved herein and filed quarterly cabaret tax returns for each of the eleven calendar quarters involved. The Commissioner of Internal Revenue determined that (1) the total sales for cabaret tax purposes were understated and (2) that there were additional sales during the periods of entertainment during which the tax is due.

The plaintiff reported approximately 50% of his sales as being made during the entertainment period, but the Commissioner determined that approximately 90% of sales were made during the period of entertainment. The jury, in its special interrogatory, found that approximately 75% of the total sales were subject to the tax; and this is not being disputed.

In arriving at his determination that plaintiff's sales were understated, the Commissioner of Internal Revenue analyzed the plaintiff's purchases and then used an average mark-up to arrive at the sales figure (R. 187 et seq.). This method is legally wrong. The Commissioner, in arriving at his total figure, not only failed to take into account sales of package goods at the retail bottle price and free drinks and bottles of liquor given away, but also completely ignored the books and records.

The testimony was conflicting. Larayne Floyd's duties included clearing the cash registers and keeping daily record of sales (R. 19), testifying that all sales were rung up on a cash register tape and then later transferred to a day book. These tapes and the day book were given to the accountant, who, after testing the figures for accuracy (R. 78), would enter the daily sales with a breakdown between taxable and non-taxable sales in the books of original entry (R. 75 et seq.; Plaintiff's Exhibit 2).

The plaintiff further testified that all sales were rung up (R. 123-4).

The plaintiff did a minimum of direct advertising and the record throughout clearly shows that he promoted the club by giving free drinks and free bottles of liquor to hotel doormen, bartenders, taxi drivers and other persons who would be instrumental in sending customers to his club (R. 135, 143, 152). None of this was taken into account by the Revenue Agent in making his computations as he only allowed a small amount for spillage (R. 202); and he computed the total sales by multiplying the number of ounces in each bottle of liquor by $1.37 each and, after allowing 10% for spillage, reached a conclusion that each bottle of liquor purchased was sold for approximately $32.00. The plaintiff introduced five witnesses to testify as to free drinks and purchases of liquor at wholesale prices. None of the testimony of these witnesses was contradicted. Witness Dashiff (R. 83) testified that, for nine months during the periods involved herein, he was employed by the plaintiff and had at least five drinks per night and that, for the balance of the time, he was employed in the vicinity and would drop in the premises two or three times a night and would have a drink, for which he was not charged.

The witness, Harry D. Brannan, Jr., a disabled police officer, testified that, during the two years and nine months involved, he purchased approximately fifty bottles of liquor at $4.50 a bottle (R. 91).

The witnesses, Michael Decker and Leo Ragan, who were both taxi drivers in the Miami Beach area, testified that they would bring customers to the plaintiff's club and that they were given free bottles of whiskey for promotional purposes and that each one received one or two bottles of whiskey per week (R. 102, 109). The witness, Helen Miller, testified that, during the periods involved, she purchased approximately one bottle of whiskey per week at wholesale prices (R. 116).

The government agent who conducted the audit, in his testimony (R. 243), stated that he had been told by the plaintiff that a lot of liquor was given away but he made no allowance for these give-aways.

In connection with the adequacy of the books and records, Mrs. Floyd testified that the day book could not be located as the club had been closed in 1962 and the records were then moved to her garage and later to the accountant's office and that a diligent search had been made for the day book but that it could not be found (R. 27, et seq.). Mr. Gunther, the Internal Revenue agent (R. 225), testified that the records were not adequate as he needed the tapes and yet he testified, on direct examination (R. 185), that he had gone over the tapes and seen them and, on cross-examination (R. 240), that he had seen the tapes.

He further testified (R. 226) that there is no Treasury Regulation that says that a cabaret must keep any records other than the books of original entry where the tax is included in the price and (R. 230) that there is no regulation requiring that a record of free merchandise be kept.

In the context of this sharp conflict the trial judge charged the jury that the taxpayer not only had the burden of introducing evidence to rebut the administrative presumption of regularity but also, even if he were to meet this burden, he had the additional burden of proving the correct amount of his tax liability. In other words, the Government did not have any part of the burden of proof on its counterclaim.

REASONS FOR GRANTING THE WRIT

The reasons relied on for the issuance of the writ are as follows:

First: The decision below conflicts with that of other Courts of Appeal and of this Court.

Second: It is of public importance to have an authoritative, definitive, nationwide rule, as to whether a taxpayer who has the burden of introducing evidence to rebut the administrative presumption of regularity that the determination of the Commissioner of Internal Revenue is correct, having shown the assessment to be incorrect, has the additional burden of proving the correct amount of his own tax liability.

1. The Fifth Circuit Court of Appeals stated in this case that it was "convinced, that the instructions [of which we complain] if erroneous which [they did] not hold, did not constitute such a plain, fundamental and prejudicial error that [they] should notice it absent an objection in accordance with Rule 51" (App. A).

United States v. *Tennessee*, 176 U.S. 242, holds that an assignment of error is not necessary to give a court of appeal authority to notice a plain error.

There is no doubt that the plaintiff produced — to say the least — "some evidence" which was sufficient to dry up the presumption. The traveling distance of the presumption was misunderstood by the trial Court below, and this misunderstanding led to the following instruction:

> "The plaintiff has the burden of introducing evidence to rebut the presumption that the determination of the Commissioner of Internal Revenue is correct. Should you find that the plaintiff has introduced such evidence, the plaintiff still has the burden of proving the correct amount of the tax liability." (R. 304).

This instruction, emanating from a judge, charged with the application of equitable principles, imparts to a jury the idea that the presumption remains until it is completely rebutted, overcome or destroyed by evidence to the contrary. This instruction which goes to the heart of the law to be applied by the jury invests the presumption with more value than it legally possesses and leaves the jury with the idea that they are dealing with two weights in balancing the scales of justice: one dish containing the "presumption" and the other the "preponderance".

> The jury was further explicitly instructed that: It is the law that the determination of the Commissioner of Internal Revenue shall be held to be correct unless plaintiff by competent proof affirmatively and by a preponderance of the evidence shows that the determination of the Commissioner of Internal Revenue was erroneous." (R. 304)

Counsel did not make a request for a change in the language of the charge as to the operative effect of the presumption. Rule 51 places upon counsel the responsibility of doing so as an aid in the clarification of the appropriate standards of evidence. But Rule 51 is not a procrustean bed. This Court still "has [the] power to decide on the whole trial record whether the likelihood of a miscarriage of justice is such as to warrant a review of the error, even in the absence of objection or exception at the trial." (32 Am.Jur.2d 906, 907)

See also: *Blier* v. *United States Lines Co.* (C.A. 2, N.Y.), 286 F.2d 920, 1961, cert.den. 368 U.S. 835, 7 L.Ed. 2d 37, 1961.

From *Nuelson* v. *Sorenson*, (C.A. 9, Cal. 1961) 293 F.2d 454, 462, we learn that "There however is no rigid and undeviating judicially declared practice under which courts of review invariably and under all circumstances decline to consider all questions which have not previously been specifically urged, and indeed there could not be without doing violence to the Statute (28 U.S.C. Sec. 2106) which gives federal appellate courts the power to modify, reverse or remand decisions 'as may be just under the circumstances'." (32 Am.Jur.2d, Federal Appellate Practice and Procedure, p. 907, note 8).

See also: *Bird* v. *United States*, (C.A. 1, Mass. 1957) 241 F.2d 516.

In *Wirtz* v. *International* (C.A. 5, 1964) 331 F.2d 462, which dealt with an exemption under the Fair Labor Standards Act, the Fifth Circuit Court applied the "plain error" principle. In *Wirtz* the facts and all issues, except the one under review, were stipulated. The Court at nisi prius had instructed the jury that the issue was whether the sales involved were regarded as retail "by" the industry rather than "in" the industry. The jury was also instructed to answer the question "yes" or "no". Custom and usage "in" the industry was the critical element. There was testimony from a government expert that sales were not regarded in the industry as retail sales. Countervailing testimony for the defendant was that the sales were regarded in the industry as retail sales. There were no objections to the charge. Nevertheless, the government made the primary point on appeal that the use of the word "by" was in conflict with the statutory term "in" and the Fifth Circuit Court applying the "plain error" rule reversed the decision.

In *Ratay* v. *Lincoln*, 378 F.2d 209, C.A. 3, 1967, the court, in a fraud case, charged the jury that the plaintiff had to establish his case by a "fair preponderance of the credible evidence." No objection was taken. The judgment was reversed because the proper standard was evidence that was "clear, precise and indubitable." The error in instructing the jury as to the proper burden was so fundamental and prejudicial as to justify review. The Court wrote that:

> "The record indicates that the plaintiff made no specific objection to the charge as given but was apparently content to rest on a general exception granted by the trial judge. This inaction

> would ordinarily preclude our consideration of the error of this appeal. Federal Rules Civ. Proc., Rule 51, 28 U.S.C.A.; *McNello* v. *John B. Kelly, Inc.*, 283 F.2d 96, 102 (3rd Cir. 1960); *Callwood* v. *Callwood*, 233 F.2d 784, 788 (3rd Cir. 1956). It remains for us to consider whether the error in the instruction was so fundamental and highly prejudicial as to justify our review of it despite the absence of a proper objection. Ibid. We think it was. The erroneous instruction related to a critical issue and cannot be regarded as harmless unless it affirmatively appears from the whole record that it was not prejudicial to the substantial rights of the plaintiff. *McCandless* v. *United States*, 298 U.S. 342, 347, 348, 56 S.Ct. 764, 80 L.Ed. 1205 (1936); *United States* v. *McNally Pittsburg Manufacturing Corp.*, 342 F.2d 198, 202 (10th Cir. 1965); *Sears* v. *Southern Pacific Company*, 313 F.2d 498, 503 (9th Cir. 1963). It does not so appear in the instant case."

The first, second, third and tenth circuits are in accord: *Bird* v. *U. S.*, (C.A. 1 Mass. 1957) 241 F.2d 516; *Horton* v. *Moore, McCormack*, (C.A. 2, 1964) 326 F.2d 104; *Mazer* v. *Lipschutz*, (C.A. 3, 1964) 327 F.2d 42; *Smith* v. *Welch*, (C.A. 10, 1951) 189 F.2d 832, but the fifth circuit has departed from its earlier concurrence with the same principle in *Wirtz*.

In *McNello* v. *Kelly*, 283 F.2d 96 (C.A. 3, 1960) the Court of Appeals reversed as fundamental error a determination of the District Court, even though no objection had been taken to a charge which failed to relate the evidence to the law of negligence.

Again, in *Ferrara* v. *Sheraton* (C.A. 2, 1962) 311 F.2d 294, the third headnote of the syllabus reads as follows:

> "When integrity of judgment has been called into question by substantial departure from rules of law, appellate court cannot put aside responsibility merely because of inadvertence of appellate counsel at trial."

In *Ferrara* it was also held that the Court had committed reversible error when "it told [the] jury no more about constructive notice than that [the] jury could infer from testimony whether or not [the] hotel had what the law knows as constructive notice of condition" (syllabus). Such error it was said "required reversal even in [the] absence of timely and precise objection below" (syllabus).

Other illustrations are found in Moore's treatise on Federal Practice, Vol. V, p. 2504, note 4.

The decision in this case appears to conflict with the foregoing authorities, especially on the point of their respective holdings that an improper charge will be reversed on appeal irrespective of objection below.

2. The jury's verdict in this case unexplained as it is, is impenetrably dark. No one can say what went on in the jurors' minds on any issue in this case. In the absence of clear instruction we cannot be reasonably sure of the principles which they applied to the solution of the problem presented to them.

The jury was there to orchestrate the rendition of a verdict and it is not possible to guess how they reacted to any piece of evidence, but since there was a failure to instruct them properly in the first place that deficiency goes to the very integrity of the decisional process.

Without a proper, uncomplicated major premise in the form of the proper rule, no jury can work the minor premise from the evidence and use the syllogism to produce a logical conclusion in the verdict which must be reported. It is widely recognized that it is difficult enough for a jury to grasp the principles and rules of law governing the standards of proof without giving them the wrong rule to apply. It is intolerable under our law to permit the jury to be improperly instructed regardless of whether a lawyer has or has not requested the proper instruction. When the decisional jury process is denied effective application for lack of appropriate instruction, an appellate court should not be permitted to put aside responsibility because a lawyer was inadvertent. Otherwise, the law could become as variable as each juror's current fancy, and the principles governing taxation in this area; principles of wide application, would be subverted.

If this were a case involving purely private litigants, certiorari would be justified because the Court has ignored the plaintiff's fundamental right to an appropriate charge, absent which a jury cannot conceivably arrive at an informed judgment. But, since this is a tax case to which the government is a party, then it is a fortiori of importance to take jurisdiction to settle the question which affects every taxpayer in petitioner's category.

In our view, the Circuit Court in this case has incorrectly approved a major error of the District Judge in failing to instruct the jury in the law on the subject. Any error which curtails a right so basic is never harmless.

ARGUMENT

The Government is entitled to the presumption of administrative regularity, but the suit must be determined by equitable standards. An action to recover a tax, although in form one at law, is "predicated upon the same equitable principles [as those which] underlie an action in assumpsit for money had and received." (*Stone* v. *White*, 301 U.S. 532, 57 S.Ct. 851, 853, 1937).

Assuming that the taxpayer's burden is somewhat broader than it is in the Tax Court, it not quite so broad as envisioned by the trial judge. The Supreme Court, in *Helvering v. Taylor*, 293 U.S. 507, 1935, in affirming the decision of the Circuit Court, 70 F.2d 619, C.A. 2, 1934, has in effect held that although the ". . . taxpayer has the burden of proving that [the assessment] was wrong, after he has done so, he need not, at least under ordinary principles of procedure, prove that he owed no tax, or what was the tax he did owe." Moreover, the presumption of correctness is not evidence; and it disappears in the face of countervailing evidence.

This brings us to a consideration of the nature of the presumption and its legal effect in a litigation of this sort.

Prof. McCormack "has venture[d] the assertion that presumption is the slipperiest member of the family of legal terms." (Evidence Hornbrook, 1954, p. 639), while Prof. Thayer (Prel. Treat. Evid. 563, 575) finds that the only effect of a legal presumption as a presumption of law is to throw on the party against whom it operates the burden of going forward with the evidence.

Prof. Wigmore is in accord (4, Evid. Sec. 3529, 3536). He refers to — one jurist who colorfully defined it ". . . as the bat of the law, flitting in the twilight, but disappear-

ing in the sunshine of actual facts." (*Stumpf.* v. *Montgomery*, 101 Ore. 257, 226 Pac. 65, 69, 1924).

A correct appreciation of the trial mechanics and rules of evidence applicable leads us to suggest at the outset that we must critically distinguish between the office of the presumption and that of burden of proof. The presumption may suffice to take the case to the jury, but the latter must be adequately instructed on the function and value of the presumption before it may intelligently and fairly proceed to determine whether a litigant has successfully carried his burden.

The "presumption is not evidence and with the introduction of evidence opposed to the Commissioner's determination, the presumption of correctness is overcome." (Citing authorities, *Caswell* v. *U.S.* 205 F.Supp. 576, 1962, U.S.D.C.N.D. Calif., 1962)

"The presumption in favor of the Commissioner's determination disappears where it appears that the determination is incorrect and there is no burden of proof on the taxpayer to show the correct amount of the assessment."

> 47 C.J.S. at p. 197 of the 1968 Pocket Part to Sec. 677. *Gasper* v. *C.I.R.C.A.* 225 F2d 284, 6th Cir., 1955. *Miller* v. *U.S.C.A.* 296 F2d 457, Ill., 7th Cir., 1961 *Fuller* v. *C. I. R. C. A.* 313 F.2d 73, Ohio, 6th Cir., 1963.

After evidence was produced to show extensive giveaways of liquor, the presumption "vanished from the case."

> *Johnson* v. *Mills*, 37 So.2d 906, 907, 1948, Fla. Sup.Ct.; *Leonetti* v. *Boone*, 74 So.2d 551, 1954, Fla.Sup.Ct.; *Davis* v. *Loftin*, 75 So.2d 813, 1954, Fla.Sup.Ct.

Dean Wigmore explains that the jury may accept the inference of the presumption "*in the absence of evidence to the contrary* from the opponent. If the opponent [says he] does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hand free from any rule." Sec. 2491, Evidence, p. 289).

In a note at VIII Col. L. R. p. 127, et seq. which treats with "Presumptions of Law as Evidence" the author, after commenting on the views of Dean Wigmore and Prof. Thayer, to which, we have adverted, anatomizes the presumption as one requiring either,

(a) some evidence to the contrary;

(b) or a logical inference from the fact on which it is based;

(c) or a certain kind of evidence, as a rule of substantive law.

Patently, "(b)" is not applicable to this case. "(c)" is contrary to the text and case literature, leaving only "(a)".

> "While the courts [says the author] do not often separate the artificial from the rational force, *Clayton* v. *Wardell*, (1850) 4 N.Y. 230; *Piers* v. *Piers*, (1849) 13 Jurist, 569, 572; *Carpenter* v. *Calvert*, (1876) 83 Ill. 62; *Waddingham* v. *Waddingham*, (1886) 21 Mo.App. 609 . . . the common charge that the presumption remains until re-

> butted . . . overcome . . . or destroyed by evidence to the contrary . . . seems to impart more or less artificial force to the presumption in the minds of the jury Whether it reach them in a form of a conclusion of law closely bound up with the rational inference or through the medium of a more or less unconscious coloring of the facts, the jury find nothing illogical in balancing the presumption as a whole against other logical inferences. (p. 128)

In his opening remarks, counsel for the Government stated that if the jury believed the defendant that he gave away the liquor, he was ". . . probably entitled to the sales figure which he stated." (R.16). And so this was the question which the jury received. Plaintiff then introduced five witnesses who testified without contradiction to the free drinks and "wholesale" sales of liquor which were not utilized for taxable purposes. Let's assume that the jury had the right to weigh the credibility of their testimony even if they were not directly contradicted. Under such an assumption, no one can prophesy how much weight the jury may have cast for it in the balance. Once the balance was artifically weighted by the presumption, they may have thought that the scales did not tip in favor of defendant. Even in the absence of an exception, the court will reverse where the standard is erroneous.

In our case, the Court charged that the taxpayer had a double burden (1) to introduce evidence to negate the presumption (in which instance all authorities are in accord that the burden of proof passes to the government to prove the correctness of its assessment) and (2) to prove the correct amount of the tax liability. (R. 304).

These instructions are erroneous beyond doubt. This egregious error was compounded by the additional charge that the assessment had "to be held correct" unless the taxpayer "by a preponderance of the evidence" showed that it was wrong. (R. 304).

The *Model Code of Evidence*, Rule 704(2), states that ". . . when the basis fact has been established . . . and evidence has been introduced which would support a finding of the non-existence of the presumed fact is to be determined exactly as if no presumption had ever been applicable . . ." and the relevant comment reads "A presumption, to be an efficient legal tool must . . . (2) be so administered that the jury never hears the word presumption used since it carried unpredictable connotations to different minds."

The *Thayer* doctrine dealing with "Presumptions", (*Prel. Treat. Evidence*, 563, 575) is the one currently accepted and widely followed.

See: 9 *Wigmore, Evidence*, Sec. 2486 31 *C.J.S., Evidence*, Secs. 103-105 *Dec. Dig., Evidence*, Keys 90-97

Even competing doctrine concedes that the "jury needs guidance in this situation if they are to give due effect to the probabilities and frequently the substantive policy on which the presumption is based." (*Jones, Evidence*, Vol. 4, p. 1905).

Realistically, when a jury is told that they must presume that the government is correct, they infer that the presumption is conclusive. This was one of the reasons

why the framers of the Model Code of Evidence felt that the presumption was spent when evidence was produced from which an inference could be made that the presumed fact was not correct.

Prof. Morgan was an ardent critic of the rationale of the Thayer doctrine but he too concluded that the presumption is to last only so long as ". . . the evidence persuades the trier, at least that the non-existence of the presumed fact is as probable as its existence."

> *Professor E. M. Morgan, Presumptions and Burden of Proof*, 47 Harv. L.R., p. 83.

If our jury had at least been told that the presumption of administrative regularity was to be accepted unless the countervailing evidence balanced the scales, in which case they could decide against the one carrying the presumption, there would be some "equipoise." (*Helvering* v. *Taylor*, 293 U.S. 507, 1935).

A citizen in the posture of defending against an assessment is already afflicted with an extremely serious psychological and legal burden, which becomes intolerably heavy and unjust when improper weight, is by the charge, assigned to the presumption.

On this record, the instructions to which we have referred promoted an imbalance which as a matter of law, requires a reversal and a new trial to redress the balance, particularly because it does not affirmatively appear from the whole record that your petitioner was not damaged by this charge.

It is not the function of an appellate court to decide whether the evidence could have been accepted as sufficient by a properly instructed jury or to speculate what the jury may have found if they were supplied with the proper rule as to how to evaluate the evidence. An uninstructed jury represents a serious flaw in the judgmental process, requiring the reversal of the judgment.

CONCLUSION

WHEREFORE, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

J. LEONARD FLEET

By_____

Sidney A. Soltz, *of counsel*
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1940 Harrison Street
Hollywood, Florida

CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the above and foregoing petition was mailed to the Solicitor General, United States Department of Justice, Washington, D.C., this _____ day of June, 1969.

J. LEONARD FLEET

By_____
Sidney A. Soltz, *of counsel*